

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter

5 SECURITIES INVESTOR

6 PROTECTION CORPORATION, Case No. 08-01789-SMB

7 Plaintiff,

8 VS.

9 BERNARD L. MADOFF INVESTMENT

10 SECURITIES, LLC, ET AL.

11 Defendants.

12 - - - - - x

13 IN RE:

14 BERNARD L. MADOFF

15 Debtor.

16 - - - - - x

17 IRVING H. PICARD, Trustee

18 For the LIQUIDATION OF Case NO. 10-04390-smb

19 BERNARD L. MADOFF INVESTMENT

20 SECURITIES, LLC.

21 Plaintiff

22 VS.

23 BAM, L.P., ET AL.

24 Defendants.

25 - - - - - x

United States Bankruptcy Court

One Bowling Green

New York, New York 10004-1408

April 24, 2019

10:02 AM

B E F O R E:

HON. STUART M. BERNSTEIN

U.S. BANKRUPTCY JUDGE

1 HEARING RE: Case No. 08-01789-smb, Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities; Trustee's Thirtieth Omnibus Motion to Disallow
4 Claims and Overrule Objections of Claimants Who Have No Net
5 Equity.

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7 HEARING RE: Case No. 08-01789-smb, Securities Investor
8 Protection Corporation v. Bernard L. Madoff Investment
9 Securities; Twenty-Ninth Application of Trustee and Baker &
10 Hostetler, LLP for Allowance of Interim Compensation for
11 Services Rendered and Reimbursement of Actual and Necessary
12 Expenses Incurred from August 1, 2018 through November 3,
13 2018.

14
15 HEARING RE: Case No. 08-01789-smb, Securities Investor
16 Protection Corporation v. Bernard L. Madoff Investment
17 Securities; Application of Browne Jackson, LLP, as Special
18 Counsel to the Trustee for Allowance of Interim Compensation
19 for Services Rendered and Reimbursement of Actual and
20 Necessary Expenses Incurred from August 1, 2018 through
21 November 30, 2018.

1 HEARING RE: Case No. 08-01789-smb, Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities; Twenty-Eighth Application of Windels, Marx, Lane
4 & Mittendorf, LLP, for Allowance of Interim Compensation for
5 Services Rendered and Reimbursement of Actual and Necessary
6 Expenses Incurred from August 1, 2018 through November 30,
7 2018.

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9 HEARING RE: Case No. 08-01789-smb, Securities Investor
10 Protection Corporation v. Bernard L. Madoff Investment
11 Securities; Application of Schiltz & Schiltz as Special
12 Counsel to the Trustee for Allowance of Interim Compensation
13 for Services Rendered and Reimbursement of Actual and
14 Necessary Expenses Incurred from August 1, 2018 through
15 November 30, 2018.

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17 HEARING RE: Case No. 08-01789-smb, Securities Investor
18 Protection Corporation v. Bernard L. Madoff Investment
19 Securities; Application of Williams, Barristers & Attorneys
20 as Special Counsel to the Trustee for Allowance of Interim
21 Compensation for Services Rendered and Reimbursement of
22 Actual and Necessary Expenses Incurred from August 1, 2018
23 through November 30, 2018.

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1 HEARING RE: Case No. 08-01789-smb, Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities; Application of Higgs & Johnson as Special
4 Counsel to the Trustee for Allowance of Interim Compensation
5 for Services Rendered and Reimbursement of Actual and
6 Necessary Expenses Incurred from August 1, 2018 through
7 November 30, 2018.

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9 HEARING RE: Case No. 08-01789-smb, Securities Investor
10 Protection Corporation v. Bernard L. Madoff Investment
11 Securities; Application of Soroker, Agmon, Nordman as
12 Special Counsel to the Trustee for Allowance of Interim
13 Compensation for Services Rendered and Reimbursement of
14 Actual and Necessary Expenses Incurred from August 1, 2018
15 through November 30, 2018.

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18 HEARING RE: Case No. 08-01789-smb, Securities Investor
19 Protection Corporation v. Bernard L. Madoff Investment
20 Securities; Application of Graf & Pitkowitz Rechtsanwalte
21 GMBH as Special Counsel to the Trustee for Allowance of
22 Interim Compensation for Services Rendered and Reimbursement
23 of Actual and Necessary Expenses Incurred from August 1,
24 2018 through November 30, 2018.

1 HEARING RE: Case No. 08-01789-smb, Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities; Application of Ritter, Schierscher Rechtsanwälte
4 as Special Counsel to the Trustee for Allowance of Interim
5 Compensation for Services Rendered and Reimbursement of
6 Actual and Necessary Expenses Incurred from August 1, 2018
7 through November 30, 2018.

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9 HEARING RE: Case No. 08-01789-smb, Securities Investor
10 Protection Corporation v. Bernard L. Madoff Investment
11 Securities; Application of Young, Conaway, Stargatt &
12 Taylor, LLP, as Special Counsel to the Trustee for Allowance
13 of Interim Compensation for Services Rendered and
14 Reimbursement of Actual and Necessary Expenses Incurred from
15 August 1, 2018 through November 30, 2018.

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17 HEARING RE: Case No. 08-01789-smb, Securities Investor
18 Protection Corporation v. Bernard L. Madoff Investment
19 Securities; Application of UGGC & Associates as Special
20 Counsel to the Trustee for Allowance of Interim Compensation
21 for Services Rendered and Reimbursement of Actual and
22 Necessary Expenses Incurred from August 1, 2018 through
23 November 30, 2018.

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1 HEARING RE: Case No. 08-01789-smb, Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities; Application of Eugene F. Collins as Special
4 Counsel to the Trustee for Allowance of Interim Compensation
5 for Services Rendered and Reimbursement of Actual and
6 Necessary Expenses Incurred from August 1, 2018 through
7 November 30, 2018.

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9 HEARING RE: Case No. 08-01789-smb, Securities Investor
10 Protection Corporation v. Bernard L. Madoff Investment
11 Securities; Application of Robbins, Russell, Englert,
12 Orseck, Untereiner & Sauber, LLP as Special Counsel to the
13 Trustee for Allowance of Interim Compensation for Services
14 Rendered and Reimbursement of Actual and Necessary Expenses
15 Incurred from August 1, 2018 through November 30, 2018.

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17 HEARING RE: Case No. 08-01789-smb, Securities Investor
18 Protection Corporation v. Bernard L. Madoff Investment
19 Securities; Application of Scaletta Law Firm, PLLC as
20 Special Counsel to the Trustee for Allowance of Interim
21 Compensation for Services Rendered and Reimbursement of
22 Actual and Necessary Expenses Incurred from August 1, 2018
23 through November 30, 2018.

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1 HEARING RE: Case No. 10-04390-smb, Irving H. Picard,
2 Trustee for the Liquidation of Bernard L. Madoff Investment
3 v. Bam, L.P., et al; Trustee's Motion for Summary Judgment.
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25 Transcribed by: Pamela A. Skaw

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8 LAN HOANG, ESQUIRE

9 IRVING H. PICARD, ESQUIRE

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11 DAVID J. SHEEHAN, ESQUIRE

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good morning.

3 (Chorus of good morning)

4 THE COURT: Madoff.

5 (Pause)

6 MR. CREMONA: Good morning, Your Honor.

7 Nicholas Cremona of Baker & Hostetler appearing on
8 behalf of the Trustee.

9 As Your Honor will note from the agenda, we have
10 three items that are set go forth; the twenty-ninth interim
11 fee applications, the Trustee's thirtieth omnibus vclaims
12 motion and a motion for summary.

13 We're happy to proceed in any order that Your
14 Honor would see fit.

15 THE COURT: Why don't we do the fee applications
16 just so if anybody wants to leave, they can leave --

17 MR. CREMONA: Okay.

18 THE COURT: -- if they don't have an interest in
19 the other matters.

20 MR. CREMONA: Thank you, Your Honor.

21 (Pause)

22 MR. SHEEHAN: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. SHEEHAN: It's been a while but
25 David Sheehan on behalf of Baker Hostetler appearing for the

1 Trustee, BLMIS and for the law firm of Baker Hostetler in
2 connection with the twenty-ninth fee application.

3 As Your Honor is aware, most of the things that
4 are happening in the domestic front, I can report to you
5 that the motion to stay discovery in connection with the ADA
6 cases that were returned to you, other (indiscernible) that
7 I'm sure you know that that was granted so there will be no
8 discovery applications in connection with that.

9 And, in terms of the foreign proceedings, I just
10 want to mention three of those to you that are not so
11 apparent but are apparent from the time references.

12 There have been a number of discovery applications
13 before Your Honor but they then carried over other areas
14 such as Bermuda in connection with HSBC and some discovery
15 that took place there which involved our local counsel quite
16 a bit.

17 Through his law discovery and (indiscernible) in
18 the United Kingdom so any (indiscernible) that were -- it
19 was during the reporting period. And so they required a
20 great deal of time and there was a good deal of opposition
21 and there was a lot of litigating back and forth.

22 They eventually took place. Your Honor may be
23 aware of that.

24 But, in any event, that is why there was so much
25 time that took place with respect to the English law firm.

1 And then lastly, of course, there is the legacy --
2 I'm sorry, the magnify matter and the -- in the Israeli
3 courts.

4 What's happening there is is that we are
5 attempting to mediate that. As Your Honor is aware, there's
6 multiple parties there; some direct, mostly subsequent.

7 So, we are in the process of assembling -- and
8 there should be a mediation at the end of May. At which
9 point, we'll make a decision whether we continue in Israel
10 or whether we just go forward here in the United States.

11 So, that comprehends exactly what's happening in
12 most of those cases. Lots of activity, as Your Honor knows
13 from looking at those time records. It occurs in all
14 jurisdictions; France, Luxenberg. Austria.

15 There's always activities taking place there,
16 usually in the form of discovery that is still taking place
17 today as the European Courts slowly get through this
18 process. Just like it takes a long time here, it takes a
19 long time there to resolve all of this.

20 So, at the end of the day, we're feeling as though
21 with the cases returned to us, that there's probably another
22 couple years of this litigation that will take place and
23 we're looking forward to obviously resolving everything to
24 the satisfaction of the Court.

25 And I would move today that we -- for the approval

1 of the Trustee and his counsel's application but also for
2 all the counsel that we retain outside the country and are
3 familiar to you.

4 And as -- and lastly and most exemplary is, of
5 course, Windels, Marx and all the work they've done for us
6 both as conflicts counsel, as co-counsel, too, in a number
7 of cases that we're proceeding on before Your Honor.

8 Thank you very much.

9 THE COURT: Thank you.

10 (Pause)

11 MR. BELL: Good morning, Your Honor.

12 Kevin Bell on behalf of the Securities Investor
13 Protection Corporation.

14 It was 3,786 days ago that this case began and, if
15 your Court would like other information on dates and times,
16 I can --

17 THE COURT: At this point, that's more than
18 enough.

19 MR. BELL: SIPC has filed its recommendations with
20 regard to all these applications. SPIC has intensively
21 reviewed each and every application and the invoices
22 thereunder. Every entry is read and when questions are --
23 arise, I ask those questions and get the answers and the
24 former general counsel, who is not the president and CEO of
25 SIPC, Ms. Wang, has reviewed them.

1 She took that office after she signed the
2 recommendations. So, she is now the new head of SIPC.

3 We -- I would note, as I always do, with regard to
4 the twenty-ninth fee application of Baker Hostetler, at
5 paragraph five, the review by SIPC has caused reductions in
6 the request of -- to the tune of about 14.74 percent which
7 includes the ten percent agreed reduction.

8 And Wendel's, in their paragraph three, that
9 reduction, after the review, including the ten percent off
10 the regular rates is 16.68 percent.

11 In light of the fact that the statute provides
12 where there is still no likelihood of this being a -- other
13 than a no asset case --

14 THE COURT: That's not what you told me about a
15 year ago.

16 MR. BELL: -- that we will have a general -- huh?

17 THE COURT: That's not what you told me about a
18 year ago.

19 MR. BELL: Well, Your Honor, I expect that by the
20 time the Supreme Court denies cert, maybe this time next
21 year, we will get those 88 cases going involving somewhere
22 between three and four billion dollars.

23 THE COURT: Uh-huh.

24 MR. BELL: And Mr. Sheehan is more optimistic than
25 I am on a timeline. I think it will be longer.

1 But I do -- since your order in January allowed
2 the trustee to make the distribution, there is 66.633
3 percent of the stolen customer property back in the hands of
4 the people who had allowable claims and the pursuit to the
5 goal of satisfying everybody continues.

6 I, of course, am always overly optimistic that we
7 will get there.

8 And, in light of certain recent decisions, I think
9 that the path is becoming less rocky and I would ask the
10 Court to approve these -- all these applications.

11 Does the Court have any questions?

12 THE COURT: No, I don't. Does anyone else want to
13 be heard in connection with the fee applications?

14 Hearing no response, I'll approve them in light of
15 SIPA's recommendation and the grudging representation by
16 Mr. Bell that the estate may not -- the customer estate may
17 not be solvent.

18 So, you can submit an order. Thank you.

19 MR. BELL: Thank you, Your Honor.

20 MR. SHEEHAN: Thank you, Your Honor.

21 THE COURT: Why don't we deal with the claims
22 objections now.

23 (Pause)

24 MR. BLANCHARD: Good morning, Your Honor.

25 Jason Blanchard for the Trustee.

1 THE COURT: Good morning. Oh, the -- thank you.

2 MR. BLANCHARD: Before the Court is the Trustee's
3 thirtieth omnibus motion to disallow claims and overrule
4 objections of claimants who have no net equity.

5 We received one objection to the motion from
6 Dr. Melton on behalf of Melton Trust pro se.

7 The objection essentially contends that the Melton
8 Trust's -- the Trustee's calculation of the Melton Trust net
9 equity claim was incorrect because it included deposits and
10 withdrawals from a prior predecessor account.

11 THE COURT: Oh-huh.

12 MR. BLANCHARD: We just wants to note, for the
13 Court, that the Melton Trust appears to be represented by
14 counsel. Counsel of record filed a notice of appearance
15 several years ago and hasn't formally sought this Court's
16 request to withdraw.

17 In addition, courts in this circuit have denied or
18 not permitted pro se parties from representing a trust in
19 federal court.

20 THE COURT: I understand that. Let's get to the
21 merits for Melton.

22 MR. BLANCHARD: Sure.

23 THE COURT: What happened here? And what's the
24 Trustee's position on the merits?

25 MR. BLANCHARD: Sure. Sure.

1 The Trustee's position is that the books and
2 records of BLMIS for his claims determination that the claim
3 was determined according to net investment math. There was
4 only one account at all times.

5 BLMIS's books and records show that in 1992,
6 Ernest Melton formed a -- or asked BLMIS to open a customer
7 account then in the name of The Ernest Melton Trust. The
8 account was assigned an account number and, then,
9 subsequently, in 2007, Dr. Melton and his family members,
10 asked the -- BLMIS to rename the account then in the name of
11 The Diana Melton Trust.

12 The letter doesn't contained a request to transfer
13 funds, withdraw funds, reinvest them.

14 THE COURT: Well, the bottom line is no funds were
15 ever transferred. This is when the debtor has -- BLMIS
16 still had bank records.

17 MR. BLANCHARD: Correct.

18 THE COURT: Right? So, no funds were transferred
19 and the Meltons are saying that you should have opened a new
20 account. But that new account was never funded except
21 possibly by a inter-account transfer, right?

22 MR. BLANCHARD: Correct. That's exactly correct.

23 THE COURT: So, either he's a net winner or he's
24 got a zero net equity under either circumstance.

25 MR. BLANCHARD: That's right.

1 THE COURT: Because he never funded the account.

2 MR. BLANCHARD: That's correct.

3 THE COURT: All right. Does anyone else want to
4 be heard in connection with the claims objections?

5 I'm going to grant the Trustee's motion. You
6 know, I read all of Mr. Melton's and Dr. Melton's emails and
7 letters. And, no matter how you slice it, whether the Diana
8 Melton account -- trust account was a new account or simply
9 a renamed account, it was never funded with real dollars
10 under either circumstance.

11 So, as I said, either that account is a net loser,
12 if you consider it an account transfer because, in the
13 records the Trustee has produced, there wasn't any equity in
14 the Ernest Melton account when the new account or the
15 renamed account was opened or was renamed and there was
16 never any put in.

17 So, in either event, the net equity is zero.

18 Has the Trustee sued them as net winners?

19 MR. BLANCHARD: No, we did not.

20 THE COURT: Okay. All right. You can submit an
21 order and send a copy of the order to the Meltons.

22 MR. BLANCHARD: Thank you, Your Honor.

23 THE COURT: All right. I'll hear the motion for
24 summary judgment now.

25 (Pause)

1 MR. CREMONA: Good morning, again, Your Honor.

2 Nicholas Cremona appearing on behalf of the
3 Trustee.

4 We're here this morning on the Trustee's motion
5 for summary judgment against the Mann Defendants.

6 As an initial matter, Your Honor, the Trustee
7 believes that he's entitled to summary judgment because he's
8 established his prima facia case and the Defendants have
9 failed to come forward with any material issue of fact that
10 requires --

11 THE COURT: Well --

12 MR. CREMONA: -- determination by this court.

13 THE COURT: I mean, I guess the of fact that
14 they've come forward with is that the checks had the name
15 Bernard Madoff on it and the suggestion is that the account
16 was not a BLMIS account. It was a Bernard Madoff account.

17 I've read all the papers.

18 MR. CREMONA: Uh-huh.

19 THE COURT: It probably was a BLMIS account.

20 MR. CREMONA: Uh-huh.

21 THE COURT: But there's still a factual issue.

22 MR. CREMONA: I respectfully disagree, Your Honor.
23 I think that we don't even have to get to those documents or
24 the account statements because, prior to that, these
25 Defendants have admitted that they received the transfers

1 from BLMIS in paragraph 43 of their answer. They admitted
2 that they received all amounts set forth in Exhibit B of the
3 complaint, in columns 10 and 11. That would --

4 THE COURT: Well, they agree they received the --
5 you have to make a distinction I think between receiving the
6 money and receiving it from BLMIS.

7 MR. CREMONA: I -- but, yes, Your Honor, in our
8 complaint we allege that they -- that it was -- the
9 transfers of a debtor --

10 THE COURT: I know.

11 MR. CREMONA: -- or an interest in the debtor's
12 property were made by BLMIS and they admitted that.

13 THE COURT: And they're contending that the
14 proposed pre-trial order, which they never signed, is
15 essentially an amended pleading which eviscerates that
16 admission.

17 MR. CREMONA: Well, I think that's faulty as well
18 as a matter of law and we can get into that.

19 But in that pre-trial order, section two of that
20 order, provides the stipulated facts among the parties and,
21 as Your Honor acknowledged, at the December 2018 hearing, we
22 were going to utilize those stipulated facts as the facts
23 for purposes of this motion.

24 If you drill down on that joint pre-trial order,
25 you'll see in paragraphs seven, eight and nine, and that's

1 annexed to Mr. Sheehan's declaration, they ratified that
2 very admission in paragraph seven. And they went on to
3 provide greater detail in paragraphs eight and nine as to --

4 THE COURT: Which Exhibit is that? Huh?

5 MR. CREMONA: It is --

6 THE COURT: I have it. Okay. Paragraphs seven,
7 eight and nine?

8 MR. CREMONA: Yes.

9 THE COURT: Let me just --

10 (Pause)

11 MR. CREMONA: In Section 2, which is the
12 stipulated facts.

13 (Pause)

14 MR. CREMONA: I believe that's the -- it may be --
15 I'm sorry. Section 3.

16 (Pause)

17 THE COURT: I read it.

18 MR. CREMONA: So, Your Honor, I would submit that
19 the initial motion established our prima facia case and
20 there is no need for us to even address the 509 account
21 issue because the Defendants have admitted that they
22 received the transfer of an interest in the debtor's
23 property from BLMIS.

24 THE COURT: Well, it was never the debtor's
25 property.

1 MR. CREMONA: The customer property.

2 THE COURT: Right.

3 MR. CREMONA: It constitute -- excuse me, it
4 constitutes customer property.

5 THE COURT: Whether it's in the BLMIS account or
6 Madoff's account, it's never -- it's always the customers'
7 property.

8 MR. CREMONA: Agreed. And that also is an
9 important distinction.

10 But the documents who what they show. Even if
11 Your Honor were to look at them, they accounts -- the checks
12 show that they are on the 509 account.

13 The Trustee has put forward statements attached to
14 our reply declaration by Mr. Sheehan that shows that that
15 account was -- the 509 account that they claim was held by
16 Bernard L. Madoff, individually, were at -- is, in fact,
17 held by BLMIS, the debtor.

18 THE COURT: But putting aside their admission, and
19 I understand there's conflicting evidence, at the end of the
20 day, you're probably right.

21 Don't I still -- can I grant summary judgment when
22 I have conflicting evidence like that or do I have to have a
23 trial?

24 MR. CREMONA: I -- my -- I believe Your Honor can
25 absolutely grant summary judgment because the documents

1 speak for themselves.

2 THE COURT: Well, so does the check --

3 MR. CREMONA: One --

4 THE COURT: -- with just Bernard Madoff's name on
5 it.

6 MR. CREMONA: But it -- the -- what's important
7 about the check is that it bears the account number that
8 ends in 509 and it's common --

9 THE COURT: But how have you shown, as a matter of
10 law, that that was a BLMIS account when they've come forward
11 with evidence that --

12 MR. CREMONA: We have --

13 THE COURT: -- suggests, you know, that it was a
14 Bernard Madoff account?

15 MR. CREMONA: That we've submitted in
16 Mr. Sheehan's reply declaration those account statements
17 from BLMIS that show that it's a 509 -- that it's their
18 account. And it shows transfers of customer property from
19 that account during the very same time period that those
20 checks were issued.

21 And I think it's important too, Your Honor, to
22 point out that the illegal entity that they claim made those
23 transfers didn't exist at the time of the transfers.

24 THE COURT: Well, Bernard Madoff was an
25 individual. He existed.

1 MR. CREMONA: Right. But he did not possess the
2 509 account that is --

3 THE COURT: But that's the dispute. You see,
4 you're saying that the dispute is not a dispute and that's
5 -- that doesn't really get us anywhere.

6 MR. CREMONA: Well, I -- well, I guess let me --
7 let me back up and make two points, Your Honor.

8 Number one, the documents speak for themselves.
9 And, Your Honor, can review those documents and make a
10 determination as a matter of law. I don't think that's a
11 material issue of fact.

12 But there's an important concession here that
13 needs to be reiterated for the record and that is the
14 defendants here -- this is a unique case.

15 They've made important and significant concessions
16 throughout multiple hearings and in their pleadings.

17 They've conceded, by virtue of withdrawing their
18 claims and objections with prejudice to a number of things
19 as a matter of law.

20 One of which is they've conceded that they
21 received the transfer of customer property from BLMIS in the
22 amount set forth in the Trustee's determination letter when
23 they agreed to the negative net equity set forth in that
24 determination.

25 That determination letter specifically provides

1 that they received those transfers from BLMIS; that they
2 received fictitious profits; that they received other
3 people's money and that no securities were ever purchased on
4 their behalf.

5 They also agree and concede to the calculations
6 set forth on that addendum to the Trustee's determination
7 letter.

8 And I think we have to also focus on Your Honor's
9 opinion from January of this year which is also in this very
10 case which specified a number of things; not the least of
11 which Your Honor said Exhibit B to the complaint is
12 identical and it provides the exact same information as the
13 schedule to the determination letter.

14 THE COURT: I don't think we're arguing over that
15 anymore whatever the attachment to the complaint or a
16 schedule to the --

17 MR. CREMONA: Uh-huh.

18 THE COURT: -- determination letter showed. Those
19 were the ins and outs.

20 MR. CREMONA: Correct.

21 THE COURT: I guess what you're saying is they
22 gave the money to BLMIS but they withdrew the money from
23 Madoff. That seems to be what they're saying.

24 MR. CREMONA: And what I'm saying, Your Honor,
25 respectfully is their estopped from arguing otherwise.

1 THE COURT: You may be right.

2 MR. CREMONA: They can't now -- they can't, on the
3 one hand, concede to net equity and the negative net equity
4 that was calculated in the determination letter and withdraw
5 all of those arguments and their claim, with prejudice,
6 which means they now cannot reassert those very same
7 arguments.

8 Your Honor said, in your opinion, I believe it was
9 at page 19, you articulated the principles of res judicata
10 and Your Honor stated that if, on the one hand, I decide an
11 issue as to a claim, I -- and that's been decided, those
12 very same litigants cannot subsequently relitigate those
13 issues in the adversary proceedings. And that's exactly
14 what we're doing here.

15 THE COURT: Yeah. I guess their argument is I
16 didn't decide anything. They simply withdrew their claim
17 with prejudice which, to me, is a trial on the merits. But
18 -- or that's what I always understood to be a withdrawal of
19 a claim with prejudice.

20 MR. CREMONA: Well -- Your Honor, we can go
21 through the factors of res judicata which is entirely
22 consistent with the way you articulated it in your opinion.
23 We have the -- we have here very unique facts.

24 THE COURT: There's no question that if I tried
25 the objection and concluded that they were net winners,

1 shorthand method, but they couldn't relitigate that here.
2 They're arguing I never decided that. That's what they're
3 saying.

4 MR. CREMONA: But Your Honor said otherwise. Your
5 Honor --

6 THE COURT: Right.

7 MR. CREMONA: -- said that the calculation of
8 avoidance liability and the calculation of net equity are
9 precisely the same.

10 THE COURT: There's -- they're going to say I
11 never calculated the net equity. But I get it. Go ahead.
12 I get the res judicata argument. Go ahead.

13 MR. CREMONA: Okay. Well, I think their -- Your
14 Honor, I think that the -- I think we should focus on what
15 the evidence is before the Court and what the --

16 THE COURT: Right.

17 MR. CREMONA: -- the way that -- in which the
18 Trustee has satisfied his prima facia case.

19 THE COURT: Okay. Go ahead.

20 MR. CREMONA: Okay? I think there are three --

21 THE COURT: Because I'm going to ask them what
22 the issues affect.

23 MR. CREMONA: Okay. I would submit that there
24 aren't any and there aren't any for a number of a reasons.

25 I think, as an initial matter, the Trustee has

1 established the actual fraudulent intent of the debtor here.
2 And he has done so by submitting, in support of the motion,
3 the allocutions of Mr. Madoff, Mr. DiPascali (ph) and
4 several other employees.

5 THE COURT: Yeah. I read the other allocutions.
6 I'm not sure they really get you there. But DiPascali and
7 Madoff's probably do.

8 MR. CREMONA: Right. Fair enough. They certain
9 corroborate the fraud.

10 But Mr. -- let's put that aside.

11 Mr. Madoff testified, in name and substance, that
12 he was operating a Ponzi scheme from at least the 90s. Mr.
13 DiPascali confirmed that.

14 Let's be clear. The Trustee's position is that
15 the (indiscernible) was a Ponzi scheme from the outset and
16 our experts will prove that at the appropriate time.

17 But, for purposes of this case, that doesn't
18 really matter because these accounts were opened in 1995 and
19 1999. So, for all times relevant to this proceeding, we
20 believe we've established that we're entitled to the Ponzi
21 presumption and they haven't rebutted that.

22 THE COURT: Well, they --

23 MR. CREMONA: They put nothing in evidence.

24 THE COURT: You know, they argue it's not a
25 classic Ponzi scheme in the sense I get from their papers is

1 you're supposed to trace the money from customers into their
2 withdrawal, I guess.

3 MR. CREMONA: Well, Your Honor, we can gather a lot
4 of things from their papers. But there's no articulated
5 issue of fact. There's no link. There's generalities and
6 conclusory statements. Both --

7 THE COURT: Let me ask you this. What do you
8 have to prove to prove your direct case?

9 You have to prove there was a transfer. We've
10 been through that already.

11 MR. CREMONA: Right.

12 THE COURT: You have to prove that it was made
13 with the intent to defraud and that's where the Ponzi scheme
14 -- they're claiming you didn't prove that it was a Ponzi
15 scheme because you're relying on the Ponzi scheme, at least
16 on this motion.

17 MR. CREMONA: In part. We have another argument
18 on that. We'll get to.

19 THE COURT: Okay. And the amounts that were
20 transferred are not in dispute as I take it based on the
21 pre-trial order.

22 MR. CREMONA: And based on the admissions --
23 previous admissions and their withdrawal of the claim.

24 THE COURT: Do you have to prove anything else?
25 I'm just getting what's --

1 MR. CREMONA: I believe that we've -- once we've
2 established factual intent and the receipt of the transfers
3 in the amounts, I don't -- I believe that we've satisfied
4 our prima facie case.

5 THE COURT: Okay. Okay.

6 MR. CREMONA: And I think we've done that for the
7 reasons I have said based on the admissions in the record.
8 I think there is a -- then, when we look at the second
9 argument, which we've touched upon, is the res judicata
10 affect of the withdrawal of the claims with prejudice.

11 The -- Your Honor we discussed this at length in
12 September, November and December.

13 THE COURT: No. I remember the discussion.

14 MR. CREMONA: Which --

15 THE COURT: I didn't decide anything. I just
16 raised the issue that --

17 MR. CREMONA: Well --

18 THE COURT: -- that a withdrawal with prejudice
19 might lead to a res judicata or collateral estoppel effect.

20 MR. CREMONA: That's true. And defendants'
21 counsel conceded a number of things in those hearings and in
22 their pleadings in that they conceded that they're not
23 disputing the ins and outs.

24 They've conceded that -- they conceded as well
25 that the calculation of net equity is precisely the same.

1 So, once they stipulated to the negative net
2 equity here, You Honor, the the only thing they can utilize
3 as a defense to avoidance liability is positive net equity
4 and they've stipulated that it doesn't exist here.

5 So, they're collaterally estopped from raising a
6 defense to that now.

7 THE COURT: Uh-huh.

8 MR. CREMONA: And I think that -- by virtue of
9 that, they can't raise a material issue of fact. They've
10 conceded them all.

11 We had this discussion on the record and you said,
12 what's left? And I said, nothing. If they are willing to
13 do that and they have now done that.

14 And it's been validated by a final order of this
15 Court. I think that collaterally estops them from rebutting
16 our prima facia case which we've just went over how we've
17 established it.

18 And I think there's a third way in which
19 additional important concessions were made.

20 And let me just back up, Your Honor, because I
21 think it's worth stating. They've offered nothing to
22 contradict our prima facia case on the Ponzi.

23 What you've said is they articulate the hallmarks
24 of Ponzi are lacking; that, you know, somehow there's a
25 precise definition for a Ponzi. But they don't put any

1 evidence forward.

2 And I would submit to Your Honor that's a legal
3 determination that you could make based on the facts before
4 you. So, you absolutely could --

5 THE COURT: Right.

6 MR. CREMONA: -- decide as a matter of law that
7 we've met the elements of a Ponzi scheme based on the
8 evidence we've put forward.

9 So, I do think that can be determined as a matter
10 of law because there's no evidence to the contrary; there's
11 no material issue of fact other than conclusory statements
12 that say things about rates of return or treasuries that may
13 have been purchased.

14 But there's no link between any of those
15 generalities to these particular defendants at all; anywhere
16 in the papers or in what's been submitted.

17 I'd also like to point out that there's a third
18 way in which these defendants have conceded issues. And
19 that is I would ask Your Honor to take judicial notice of
20 defendants' opposition to the Trustee's motion in limine
21 which is at ECF No. 126.

22 And in that opposition at paragraph 12, the
23 defendants conceded, and I will quote from it; that the
24 fraudulent intent is not dispute here. Rather it is the
25 nature of the fraud.

1 And I would submit that by virtue of that
2 concession, they've conceded that all of the transfers here
3 were made with actual intent to defraud.

4 They now are, once again, estopped from rescinding
5 that admission. They -- that's been pleaded before Your
6 Honor.

7 In that same document, they -- at paragraph or
8 excuse me, at page four, also reiterate their admission
9 that, as a practical matter, for purposes of this adversary
10 proceeding, Mann and BAM have admitted that the transactions
11 in the complaint are accurate.

12 And I read that to mean accurate in terms of
13 receipt, amount and from the debtor. That's what our
14 complaint alleges. That's what they've conceded.

15 They -- again, couple that with their withdrawal
16 of the claim with prejudice, the admissions, the fact that
17 they've -- in that -- and, by operation of law, Your Honor,
18 they're bound by the Trustee's determination as I said.

19 And I know you're very familiar with it. It's
20 attached to our complaint.

21 It says you are advised no securities were traded
22 on your behalf. You received fictitious profits. You were
23 paid with other people's money and you withdrew more than
24 you deposited. All of which are the hallmarks of a Ponzi
25 scheme.

1 So, I'd say each of those independently, in my
2 view, Your Honor, provide us with a basis for Your Honor --
3 provide Your Honor with a basis for granting us with summary
4 judgment as a matter of law.

5 Taken in the aggregate, I think their -- it's
6 irrebuttable.

7 THE COURT: Okay. Thank you,

8 MR. CREMONA: Thank you, Your Honor. I would just
9 reserve an opportunity to rebut.

10 THE COURT: Sure.

11 MR. CREMONA: Thank you.

12 MR. BELL: Kevin Bell on behalf the Securities
13 Investor Protection Corporation.

14 SIPC supports wholeheartedly the Trustee's
15 position.

16 THE COURT: Okay. Thank you.

17 Mr. Ruegger, I think you had a motion or a request
18 to strike a reply declaration?

19 MR. RUEGGER: That's correct, Your Honor.

20 Arthur Ruegger from Dentons on behalf of the
21 defendants.

22 We made a letter motion to strike, Judge, related
23 to Mr. Sheehan's March 27th declaration and the exhibits.
24 And the reasons are several fold.

25 First, we believe that trying to put that in --

1 information in -- factual information in reply is
2 inappropriate.

3 THE COURT: Well, wasn't it a response to your
4 contention that the account was held in the name of Madoff?

5 MR. RUEGGER: It addressed that issue, Your Honor.
6 But that was not a secret that -- it was first disclosed in
7 our opposition papers.

8 THE COURT: Well, nor was it a secret that the
9 BLMIS -- that it's a BLMIS account. You've admitted it. My
10 recollection is that it was conceded on the record. It was
11 conceded in the answers.

12 It, frankly, was a non-issue until you put it in
13 which you could have chosen to put in or not put in.

14 MR. RUEGGER: Well, Your Honor, I --

15 THE COURT: Your -- look. It's over moot.

16 What you're really suggesting is that the Trustee
17 sandbagged you by ignoring an issue that I don't think is
18 really an issue in this case. But we'll find out.

19 But I'm certainly not going to imply that he acted
20 in bad faith or anything like that.

21 The record is spread out in this case and frankly
22 in other cases if you're getting into his intent, that that
23 was a BLMIS account. He's got reports of experts. He's got
24 affidavits from J.P. Morgan Chase.

25 So, to suggest that he was lying in the weeds so

1 he could put that evidence in in a reply just doesn't make a
2 lot sense.

3 MR. RUEGGER: Understood, Your Honor.

4 THE COURT: So, overruled. What don't you move
5 on?

6 MR. RUEGGER: The next two arguments we have on
7 that issue were that we'd never seen the declarations
8 before. They weren't produced in any kind of discovery.

9 THE COURT: I'm told they're in data room.

10 MR. RUEGGER: The account statements might be in
11 there. But my understanding is --

12 THE COURT: Let me ask you a question. Do you
13 really think that that account, the 509 account, was a
14 Madoff account as opposed to a BLMIS account?

15 MR. RUEGGER: If you mean by BLMIS, LLC --

16 THE COURT: LC, yeah.

17 MR. RUEGGER: Yes. I -- I believe it was, Judge.
18 It was certainly a sole proprietorship account and there's
19 no proof -- and we're not aware of any proof, that it was
20 ever shifted over to LLC.

21 THE COURT: What about the account statements?

22 MR. RUEGGER: The account statements said BLMIS.
23 They don't say LLC.

24 THE COURT: I believe they say LLC on them but I
25 have a very simple way to deal with this but go ahead. Why

1 don't you respond to the motion for summary judgment?

2 MR. RUEGGER: Very well, Your Honor.

3 We believe there are at least two issues of fact;
4 one is the transfers that we've just discussed. Those
5 checks are -- are Bernard Madoff. They're not LLC checks.

6 The second issue is whether there is proof of a
7 Ponzi scheme here.

8 We believe that there is a fraud but we believe,
9 for a variety of reasons, there's not sufficient proof of a
10 Ponzi scheme.

11 THE COURT: Well, that's what Madoff allocated to
12 and so did DiPascali.

13 MR. RUEGGER: Well, Your Honor, I'm not sure about
14 Mr. DiPascali but that gets to the threshold problem with
15 the Ponzi scheme and that is there's no controlling
16 precedent on the definition of a Ponzi scheme.

17 THE COURT: Well, but -- okay. Fair enough. But
18 Madoff testified that he -- I mean, initially he defrauded
19 people into investing with him; told them he was going to
20 buy equities or treasury notes or whatever. Didn't do it
21 and simply paid off one investor with another investor's
22 money and he had no -- and it had no business operation.
23 So, what's left?

24 What do you think is missing?

25 MR. RUEGGER: Your Honor, even if that is

1 accurate, I don't think that's a Ponzi scheme. That's a
2 fraud.

3 THE COURT: What's missing?

4 MR. RUEGGER: Needing the new investor's money to
5 pay off old investors who have a --

6 THE COURT: How do you think --

7 MR. RUEGGER: -- maturity date --

8 THE COURT: How do think he paid off the \$18
9 billion?

10 MR. RUEGGER: Well, we do know that he invested
11 the monies that he received in not only treasuries but other
12 securities.

13 THE COURT: Well whose money did he invest though?

14 MR. RUEGGER: Obviously, customer money. But he
15 made -- he had a return on some of that.

16 THE COURT: But you think -- do you think you're
17 entitled to that if some other customers' money was invested
18 to buy actual T-bills and generate interest?

19 MR. RUEGGER: Your Honor, I --

20 THE COURT: Or are you saying that because he
21 bought T-bills every quarter, that made it a legitimate
22 business?

23 MR. RUEGGER: Your Honor, we believe that he had a
24 fraud going which could have gone on and did -- does not
25 have the hallmarks of a Ponzi scheme.

1 He didn't need the new investors to pay off old
2 investors --

3 THE COURT: But how was he going to pay off the
4 investors?

5 MR. RUEGGER: He had -- he had, I think at one
6 point, \$11 billion.

7 THE COURT: But where did that come from?

8 MR. RUEGGER: Well, it -- but it could -- this
9 fraud could go on for --

10 THE COURT: I understand that. But he never had
11 anything more than investor money.

12 MR. RUEGGER: But every fraud in securities fraud
13 is customers' money.

14 THE COURT: Not necessarily. He can go out; he
15 can invest it in uranium stock or something like that and
16 puff up the stock. But there are different types of frauds.

17 MR. RUEGGER: Well, the fact that it's customer
18 money, Your Honor, we don't think makes it a Ponzi scheme
19 under any of the statutes or the case law.

20 THE COURT: All right. I got --

21 MR. RUEGGER: It was --

22 THE COURT: I got that. I understand your
23 argument and I understand your argument that it wasn't a
24 BLMIS, LLC -- a debtor account. Let's call it a SPIC debtor
25 account.

1 Are there any other factual issues that have to be
2 resolved in this?

3 MR. RUEGGER: There are a number related to the
4 Ponzi scheme, Your Honor. But if Your Honor has heard
5 enough on that --

6 THE COURT: But that's factual -- I understand
7 your argument. But I'm being told that the transfers were
8 made with fraudulent intent. That is was conceded in the
9 opposition to a motion in limine.

10 MR. RUEGGER: We have never questioned that there
11 was fraud here.

12 THE COURT: But what do I need -- but what do I
13 have to know? If you've admitted that they were transferred
14 with fraudulent intent; on whose fraud? Who was defrauded?

15 MR. RUEGGER: Well, we don't believe that the
16 Trustee is entitled to use the Ponzi scheme presumptions of
17 intent.

18 THE COURT: But -- okay. Okay. But you've
19 admitted that the transfers were made with fraudulent
20 intent, I am told, in an opposition to a motion in limine;
21 is that correct?

22 MR. RUEGGER: I -- no, Your Honor. If I
23 understood the Trustee's counsel's quote, he's -- we
24 conceded there was fraud. We do not concede that the --

25 THE COURT: I understand that. But I thought that

1 what you told me, Mr. Cremona, was that they conceded that
2 the transfers were made with fraudulent intent.

3 MR. CREMONA: Yes, Your Honor, and I'm happy to
4 hand up a copy of that. Unfortunately, I only have one copy
5 with --

6 THE COURT: Why don't you just read into the
7 record what you are referring to?

8 MR. CREMONA: Okay.

9 Your Honor, it is defendants' response and
10 objections to Trustee's motions in limine, which is ECF
11 docket number 126 filed 11/26/18.

12 And, at paragraph 12, the Trustee also cites a
13 number of cases where guilty pleas of frauds are admitted to
14 establish fraudulent intent. Fraudulent intent is not
15 disputed here. Rather, it is the nature of the fraud that
16 is at issue.

17 THE COURT: So, do I really need the Ponzi scheme
18 presumption if you've admitted that the transfers were made
19 with fraudulent intent?

20 MR. RUEGGER: Your Honor, we also believe -- I
21 don't believe that we conceded, although --

22 THE COURT: All right. I'll look at it.

23 MR. RUEGGER: This -- we haven't -- this wasn't in
24 the papers. So, I'm not sort of ready on that one, Judge.

25 THE COURT: Okay.

1 MR. RUEGGER: But it's -- the Ponzi scheme is one
2 major fact issue. And there are other aspects that -- of
3 fraud here that were not consistent with a classic Ponzi
4 scheme. There was no promise of exorbitant returns. There
5 was an investment by Mr. Madoff. His fraud was not short
6 lived or inevitably doomed. I mean, it went on for 15
7 years.

8 If it hadn't been for the financial crisis, it
9 could still be going on.

10 THE COURT: So, that makes it a -- so, if it's
11 successful fraud, it can't be a Ponzi scheme? Is that what
12 you're arguing?

13 MR. RUEGGER: Well, a Ponzi -- a classic Ponzi
14 scheme is that it is short lived and inevitably doomed
15 quickly because you're basically pleading with new investors
16 so you can take that money and pay off old investors.

17 THE COURT: Isn't that -- but isn't that exactly
18 what he did? He just didn't do it for either 16 years or 30
19 years depending on who talk to.

20 MR. RUEGGER: With respect, Your Honor, that's not
21 exactly what he did. He -- some of these older investors
22 were there for 15 years like the Man, our clients, they were
23 there --

24 THE COURT: Like the Pickauers (ph) who wind up
25 having to repay \$7.2 billion.

1 MR. RUEGGER: I think there's a lot difference
2 between the Manns and the Pickauers.

3 THE COURT: No. I'm just saying the Pickauers
4 were a longstanding customers, investors but, you know, they
5 got a lot of fictitious profits. Whose money did they get?

6 MR. RUEGGER: I -- I'm not familiar with the
7 Pickauers enough to --

8 THE COURT: Okay. You see what I'm getting at,
9 Mr. Ruegger, is -- didn't he have to be repaying, I'll call
10 them old investors and new investors, it's not exactly right
11 but wasn't he paying -- repaying one investor with another
12 investor's money since the company had no business and the
13 money was never invested or -- to generate actual profits?

14 MR. RUEGGER: Your Honor, only in the most loose
15 sense. This is more of a classic fraud, not a classic Ponzi
16 scheme. Some of his older investors like the Manns, not
17 only started in the 90s but they made investments that --
18 well, into like 2007, 2006.

19 THE COURT: Right.

20 MR. RUEGGER: I mean, this is not I'll get you --
21 double your money in 60 days, the classic Ponzi scheme.

22 There wasn't any kind of maturity date. He --

23 THE COURT: You don't think that the monthly
24 customer statements were giving that information?

25 MR. RUEGGER: They were giving what the balances

1 were. They weren't saying, and you're going to paid on a 60
2 day basis.

3 THE COURT: But how many months over those
4 whatever number of years, did the Manns lose money?

5 MR. RUEGGER: I'm not aware, Your Honor. I
6 haven't looked at their account statements.

7 THE COURT: Okay.

8 MR. RUEGGER: And I understand generally there
9 were not losses in the account statements.

10 THE COURT: Sounds like a profitable investment.

11 MR. RUEGGER: I can't disagree, Your Honor.

12 THE COURT: Okay. All right.

13 MR. CREMONA: Your Honor, if I may just -- make a
14 few clarifications.

15 THE COURT: Sure.

16 MR. CREMONA: One, just on what my colleague, Mr.
17 Ruegger, said about the certifications of the --

18 THE COURT: Oh, I want to ask something else.

19 MR. CREMONA: Okay.

20 THE COURT: Can I ask you something? And this is
21 -- goes to the collateral estoppel issue.

22 I always thought that a withdrawal of a claim with
23 prejudice was the equivalent of trying and losing that
24 claim. Is that right?

25 MR. RUEGGER: We don't believe that's true, Your

1 Honor.

2 THE COURT: Is there a dispute as to that?

3 MR. RUEGGER: We --

4 MR. CREMONA: Your Honor, we've cited case law in
5 our papers that say exactly that.

6 THE COURT: There -- if there --

7 MR. CREMONA: And Your Honor has previously
8 articulated that on the record.

9 THE COURT: Yeah. But I --

10 MR. CREMONA: I -- we --

11 THE COURT: -- wasn't deciding anything then. I
12 just thought that that was what the law was.

13 MR. CREMONA: Uh-huh.

14 MR. RUEGGER: Your Honor, at the time of the
15 withdrawal, the net equity decision had come down from the
16 Second Circuit. It was a final decision. The adversaries
17 had been started.

18 There was nothing left to decide in front of --

19 THE COURT: We've been through this already. Your
20 clients were still contesting the deposits and withdrawals.
21 I dealt with that in the case.

22 And it wasn't until the pre-trial order that they
23 finally agreed that the Trustee's calculations were correct.

24 But my question is the following: if you -- if
25 your clients' deposited money with BLMIS and only withdrew

1 money from Madoff, individually, how could they not have
2 positive net equity?

3 MR. RUEGGER: Your Honor --

4 THE COURT: They never withdrew any money.

5 MR. RUEGGER: They submitted requests for
6 withdrawals and they received checks.

7 THE COURT: But I thought the Second Circuit said
8 that you have to offset deposits and withdrawals with BLMIS,
9 not from third parties.

10 MR. RUEGGER: The Second Circuit may have said
11 that, Your Honor, but our point on the transfers is -- is
12 that the Trustee hasn't proved that that was property of the
13 debtor.

14 THE COURT: Well, none of it was property of the
15 debtor whether it was in a BLMIS account or a Madoff
16 account.

17 MR. RUEGGER: Well, it wasn't -- it wasn't
18 customer property or debtor's property.

19 THE COURT: So, you think it really makes a
20 difference if it's customer property if it's held in the
21 account of -- in Madoff's account or it's held in a BLMIS
22 account?

23 MR. RUEGGER: Well, I think it's at least a -- the
24 Trustee's burden to prove that it's the funds that came from
25 the customers that were used to pay the Manns.

1 THE COURT: Wouldn't -- assuming that it was a --
2 assuming it was a Madoff account, wouldn't the customers
3 simply be subsequent transferees of Madoff? Of -- of
4 Madoff, yeah.

5 MR. RUEGGER: I don't know, Your Honor.

6 THE COURT: Okay. Or subsequent transferees of
7 BLMIS, I guess. The money goes to Madoff from BLMIS because
8 that's where it's deposited, right?

9 Madoff steals the money, under your theory, for
10 his personal account and then he pays the customers.

11 MR. RUEGGER: But, Your Honor, also it's not
12 strictly customer account -- customer money in some of these
13 accounts. There were earnings from these treasuries, from
14 the other securities.

15 We don't know what was --

16 THE COURT: Well, you haven't demonstrated that
17 your accounts had any earnings from treasuries.

18 MR. RUEGGER: And -- correct, Your Honor. But the
19 Trustee's burden is to show that it's --

20 THE COURT: Well, the Trustee has Madoff --

21 MR. RUEGGER: -- the Trustee's property.

22 THE COURT: -- saying everything was fictitious.

23 MR. RUEGGER: And we disagree with that, too, Your
24 Honor.

25 THE COURT: I understand you disagree with it.

1 But that is evidence.

2 Okay.

3 MR. RUEGGER: Your Honor, we also -- a new issue
4 in these papers that had not been briefed or discussed
5 before is the issue of whether the Trustee can avoid
6 obligations that arose prior to the two-year reach back
7 period.

8 THE COURT: Okay. Is this the UCC argument and
9 the 548(c) argument?

10 MR. RUEGGER: No, Your Honor. It's the issue that
11 was teed up in the Kirschner and the Tribune Company
12 conveyance cases.

13 THE COURT: But those were legitimate obligations.
14 But, you know, we've been through this already.
15 Even if they were obligations, they were obligations owed by
16 BLMIS. You can't use customer funds to pay BLMIS's
17 obligations.

18 And I'm not even sure -- I don't even think they
19 were legitimate obligations. I know it -- because SIPA
20 primes the UCC on these issues according to the official
21 comment.

22 And the arguments that these were legitimate
23 obligations have not done very well in the Second Circuit in
24 several cases.

25 MR. RUEGGER: We don't agree that the -- Your

1 Honor, it's our position that whether they're legitimate or
2 illegitimate isn't the (indiscernible) --

3 THE COURT: Well, what you're saying is the
4 transfers paid legitimate obligations and unless you avoid
5 the obligations, the transfers are legitimate. And all I'm
6 saying is that argument's been rejected.

7 Maybe the Second Circuit will take a different
8 view. One of the cases is going up to the Second Circuit.

9 MR. RUEGGER: That's our understanding, Your
10 Honor.

11 THE COURT: But really this is -- you know, this
12 has been decided something like six or seven times already.

13 MR. RUEGGER: Your Honor, finally on the -- on res
14 judicata, we don't believe res judicata has any
15 applicability here. It was not the same case. It's not the
16 same issues. It's not the same --

17 THE COURT: Well, but it's the --

18 MR. RUEGGER: -- claims.

19 THE COURT: -- same issues in determining whether
20 or not you received fictitious profits because fictitious
21 profits and net equity, positive net equity, are really the
22 same issue; aren't they?

23 MR. RUEGGER: Net equity is not the same --

24 THE COURT: Subject to the statute of limitations.

25 MR. RUEGGER: But the defenses that are -- we

1 contend are available under 548, Your Honor, were not at
2 issue in the -- in that equity decision or --

3 THE COURT: I agree with you.

4 MR. RUEGGER: So, it's --

5 THE COURT: And maybe those defenses are claims
6 against the general estate. That's what I'm saying.

7 MR. RUEGGER: But I believe Judge Rakoff also
8 believed that it was a -- there are different claims and
9 different causes of action where res judicata is not --

10 THE COURT: Okay. Yes, sir.

11 MR. CREMONA: Your Honor, just a few minor points.

12 In terms of my colleague, Mr. Ruegger's statement
13 on the declarations of the custodian, those documents were
14 not -- that -- that's not new evidence at all. They were
15 part of the pre-trial order.

16 THE COURT: Was there ever a discovery request in
17 these cases?

18 MR. CREMONA: I -- we did exchange discovery. But
19 the point, I think, Your Honor, is when we submitted the
20 joint pre-trial order, Exhibit A had those custodian
21 declarations. They were listed at 228, 229 and 230 and
22 Section 7 of the joint pre-trial order specifically says,
23 the parties agree to the authenticity and admissibility of
24 the Exhibits.

25 So, I think he's foreclosed from raising that. I

1 just wanted to point that out.

2 The account statement point that Mr. Ruegger made,
3 he did not believe that they were -- the 509 accounts were
4 in the name of BLMIS. They are in the name of Bernard L.
5 Madoff Investment Securities and they were sent to the
6 attention of Dan VonVentry (ph) who's the director of
7 operations.

8 THE COURT: Well, I guess, there's a difference
9 between the accounts, the customer accounts, and the name on
10 the account at Chase Bank. Don't you have evidence that the
11 name on the accounts at Chase Bank were also BLMIS?

12 MR. CREMONA: Correct. That's what I'm referring
13 to.

14 One additional point on the opposition to the
15 Trustee's motion in limine, again, I would ask Your Honor to
16 take judicial notice. This is a different paragraph, which
17 is paragraph two.

18 And I'll just read it into the record. Defendants
19 object to the admission of the criminal pleas of
20 Bernard L. Madoff and employees of BLMIS to prove the
21 existence of a Ponzi scheme. The criminal pleas weight
22 heavily toward treating this case as a case of securities
23 and investor advisor fraud and fail to establish the
24 elements of a Ponzi scheme except for fraudulent intent.

25 That's another instance where they've conceded

1 that.

2 And I -- I guess -- I think it's already been
3 discussed at length, I think -- I can go through Madoff's
4 allocution to demonstrate that all of the hallmarks of a
5 Ponzi --

6 THE COURT: Uh-huh.

7 MR. CREMONA: -- were testified to. Those are the
8 crimes he admitted to.

9 He admitted that no transactions were made; that
10 he took money from customers to pay --

11 THE COURT: Right.

12 MR. CREMONA: -- other customers. So, I think
13 that's -- based on the record before the Court, that's been
14 demonstrated.

15 And unless Your Honor has any other questions, I
16 would rest on the papers.

17 THE COURT: No. Notwithstanding the admissions,
18 I'm still a little hung up on what this -- resolving this
19 factual issue about whether the bank accounts were in the
20 name of the SIPA debtors or Madoff individually.

21 What I would propose very simply is that you send
22 a notice to admit today that the bank accounts, the 509
23 account, was held by, in the name of, owned by, whatever you
24 want to use, BLMIS, LLC, notwithstanding whatever name
25 appeared on the check.

1 And if they deny it, 30 days from now, we'll have
2 a trial on that issue. But, you know, then you can seek to
3 the attorneys' fees and the cost of the trial, you know.

4 I don't think there are any other legal -- factual
5 issues. Putting aside all the res judicata and stuff like
6 that, I think that Madoff's allocution attest to all the
7 hallmarks of a Ponzi scheme because he says we got the
8 customer money and frauded customers into giving them the
9 money. The customer -- monthly customer statements were
10 part of the fraud.

11 There were no business operations and he simply
12 repair customer withdrawal requests with other customer
13 money. And, to me, that's the hallmark of a Ponzi scheme.

14 And I know you mentioned he didn't promise high
15 interest rates but everybody -- frankly, everybody knew what
16 -- what they were getting by investing in Madoff which is
17 why he was able to attract investors.

18 So, I suggest you do that.

19 MR. CREMONA: Your Honor --

20 THE COURT: If they want to stick with it, 30 days
21 from now, we'll just have a trial on that issue, of whose
22 account it is.

23 MR. CREMONA: Your Honor, we're happy to do that.

24 I would just --

25 THE COURT: I think it's the simplest way because,

1 as I said, I'm leery -- and I understand the admissions.
2 They're not judicial admissions at this point if I consider
3 the pre-trial orders and the amended answer. They're still
4 admissions though.

5 MR. CREMONA: Well, but, Your Honor, we should
6 address that issue then. I thought you denied Mr. Ruegger's
7 motion to -- or you did deny his motion to strike.

8 THE COURT: I denied his motion to strike.

9 MR. CREMONA: But we should the Rule 15 issue
10 because I think that's meritless and I'm happy to walk
11 through that.

12 They -- they've established -- they've asserted
13 that they amended the joint pre-trial order based on one
14 line in there that says, the pleadings --

15 THE COURT: Right.

16 MR. CREMONA: -- are amended to incorporate these
17 contentions.

18 Number one, that's inconsistent with with the
19 prior section three of the order that has the stipulated
20 facts that the parties agreed to.

21 Number two, and perhaps more important than that,
22 Rule 15 doesn't apply here. That's the Rule that --

23 THE COURT: I agree with you. There's no --

24 MR. CREMONA: That's the Rule by which they're
25 trying to amend.

1 THE COURT: There's a different Rule.

2 If you accept the pre-trial order, the unsigned
3 pre-trial order, as essentially an amended answer, which is
4 what their argument is --

5 MR. CREMONA: But that's not a valid argument
6 based -- that's based on Rule 15 which does not apply here.
7 That's -- that Rule says, it's either applies at trial or it
8 applies to an un-pleaded issue. Your Honor but let me just
9 finish.

10 THE COURT: I think they're making a different
11 argument.

12 They're not saying that I'm trying an issue that
13 was never pleaded and therefore was implied later.

14 MR. CREMONA: But that's what the Rule requires.

15 THE COURT: I understand. But what I understand
16 them to be saying, and maybe Mr. Ruegger can correct me, is
17 that the pre-trial order and their statements and their
18 contentions in the pre-trial order are essentially an
19 amended answer.

20 And to the extent that amended answer is
21 inconsistent with the answers they gave in what they would
22 now call a superseded answer, that it's no longer a judicial
23 admission; although it's still an evidentiary admission,
24 under the law.

25 MR. CREMONA: Uh-huh.

1 THE COURT: Which seems to be the law in the
2 Second Circuit, if I consider the joint pre-trial order to
3 be an amended answer.

4 Forget about, you know --

5 MR. CREMONA: Right.

6 THE COURT: -- evidence conforming to -- or the
7 pleadings conforming to the proof. It's -- I agree with
8 you; that's got no place here.

9 MR. CREMONA: And the cases that they rely upon
10 though, Your Honor, do not carry the day. They are again,
11 they focus on whether there was an un-pleaded issue; whether
12 the parties consent.

13 Clearly, there was no consent to this issue and
14 these admissions being retracted based on that one sentence.
15 And it's inconsistent with the reading of the document
16 itself. It would render it internally inconsistent.

17 And, in fact, it would nullify five years worth of
18 admissions. And we have to graft on top of that, Your
19 Honor, the withdrawal of the claim with prejudice, which
20 establishes that very issue in the Trustee's favor.

21 So, I am sorry to belabor the point --

22 THE COURT: Okay.

23 MR. CREMONA: -- but I --

24 THE COURT: All right.

25 MR. CREMONA: -- I --

1 THE COURT: I'll reserve decision.

2 MR. CREMONA: Thank you, Your Honor.

3 MR. RUEGGER: Your Honor, can I be heard on the
4 last issues you raised?

5 THE COURT: Which was what?

6 MR. RUEGGER: Whether the pre-trial order
7 essentially supersedes the answer; whether we were moot --

8 THE COURT: Well, it supersedes the issue.
9 Certainly the issues. I'm not so sure it's an amended
10 answer for what we're talking about.

11 I don't know if it matters, even it is because
12 it's still an admission and you have a lot of this other
13 stuff in the record.

14 But go ahead. Briefly.

15 MR. RUEGGER: I understand, Your Honor.

16 Just to be very quick.

17 Our letter of April 11th, which is docket number
18 171 made three arguments as to why the old answers don't
19 control.

20 First, because of the pre-trial order stipulation,
21 the language in that pre-trial order that was submitted to
22 you, it made the parties' contentions conform to the
23 evidence. This pre-trial order does never in stipulated
24 facts do we stipulate that --

25 THE COURT: He's not relying on your stipulation.

1 He's just saying you admitted it in your answer.

2 MR. RUEGGER: Right. So, argument number one; the
3 pre-trial order has a stipulation that no longer controls.

4 Argument --

5 THE COURT: But -- no, no, no, no. That's -- that
6 may not be the case.

7 In other words, you have stipulated facts in the
8 pre-trial order. And fine, those facts are stipulated and I
9 guess you could say to the extent they're inconsistent with
10 an answer you gave, the stipulated facts control.

11 You now have a contention that the transfers were
12 made from Madoff individually as opposed to from the entity
13 or the company.

14 But you -- how -- that doesn't really necessarily
15 affect your answer.

16 MR. RUEGGER: It does in two ways, Your Honor.

17 THE COURT: Except to the extent that the answer
18 is conclusive and it prevents you from raising that issue.

19 MR. RUEGGER: The parties stipulated that the
20 prior pleadings, including our answer was to be deemed
21 amended to conform to the contents.

22 THE COURT: Okay.

23 MR. RUEGGER: I can --

24 THE COURT: I'll take another look at it if that's
25 what it says.

1 MR. RUEGGER: If -- even if we didn't have that
2 stipulation, the Rockwell case says if you've got a pre-
3 trial order, that supersedes any answer.

4 And, thirdly, those are on Rule 16, not on Rule
5 15(b).

6 THE COURT: I guess I never -- but I never saw in
7 the pre-trial order, but everybody seems to be relying on
8 it, is there any dispute that I should treat it as an order
9 of the Court?

10 MR. RUEGGER: I would -- I would ask that you read
11 it carefully, Judge, in terms of what --

12 THE COURT: Well, I'll certainly read it.

13 Is it -- but I'm asking -- you're relying on it as
14 if it was signed, right?

15 My only question is whether the Trustee takes the
16 same position.

17 MR. CREMONA: We have no objection, Your Honor.

18 THE COURT: Okay.

19 MR. CREMONA: I think -- but it's also important
20 to point out that Rule 16 in that context applies to a final
21 pre-trial order when we're at trial.

22 This is a very unique case where we were going to
23 trial. Trial was stayed. Now, we're at summary judgment.

24 So, I don't think the Rule 16 application and that
25 case law have any application to this situation.

1 THE COURT: But you pointed out stipulation to me
2 in the pre-trial order in support of your motion.

3 MR. CREMONA: Yes but Your Honor articulated on
4 12/18 that we -- that we should utilize those stipulated
5 facts as agreed upon for our purposes of our Rule 56 motion,
6 which we did.

7 THE COURT: Okay. All right. Thank you.

8 I'll reserve decision.

9 I think the easier way is simply to serve them a
10 notice to admit but it'll take ten minutes to try this case.
11 But you proceed how you want.

12 MR. CREMONA: Thank you, Your Honor.

13 MR. RUEGGER: Thank you, Your Honor.

14

15 (Whereupon, these proceedings were concluded at 10:57
16 a.m.)

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C E R T I F I C A T I O N

I, Pamela A. Skaw, certifies that the foregoing transcript
is a true and accurate record of the proceedings.

Pamela A Skaw

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